

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:)	
)	
Petition for Waiver of)	CG Docket No. 02-278
National Pen Co. LLC,)	
National Pen Holdings, LLC)	CG Docket No. 05-338
)	
)	

PETITION FOR RETROACTIVE WAIVER

Pursuant to Section 1.3 of the Commission’s rules, 47 C.F.R. § 1.3, and Paragraph 30 of the Commission’s *Order*, CG Docket Nos. 02-278, 05-338, FCC 14-164 (rel. Oct. 30, 2014) (“October 30 Order”), Petitioners National Pen Co. LLC and National Pen Holdings, LLC (collectively “National Pen”) respectfully request that the Commission grant a retroactive waiver of the opt-out notice requirement in Section 64.1200(a)(4)(iv) of the Commission’s rules, 47 C.F.R. § 64.1200(a)(4)(iv). In the October 30 Order, the Commission granted a retroactive waiver of Section 64.1200(a)(4)(iv) to a group of business-petitioners facing lawsuits that alleged, in part, that the businesses had violated that rule by failing to include specific opt-out language in their faxes even when the faxes were sent with the prior express permission of the recipient. The Commission determined that, based on potential confusion surrounding the rule, good cause supported a retroactive waiver and that such a waiver was in the public interest. *See* 47 C.F.R. § 1.3; October 30 Order at ¶¶ 27-28.

National Pen is now in exactly the same position as the petitioners who were granted a retroactive waiver in the October 30 Order. National Pen faces a putative class action in the United States District Court for the Middle District of Florida based in part on allegations that it violated the requirement in Section 64.1200(a)(4)(iv) that even solicited faxes must include the

precise opt-out language specified in the Commission's rules. *See* Class Action Compl., *Christopher Lowe Hicklin DC PLC v. National Pen Co. LLC*, No. 8:14-cv-02657-VMC-TGW (M.D. Fla. filed Oct. 21, 2014) ("Hicklin Complaint") (attached as Ex. A). One of National Pen's defenses in that litigation is that it received prior express consent for its faxes. Based on Section 64.1200(a)(4)(iv), however, the plaintiff contends that prior consent is irrelevant and that the faxes must contain the precise opt-out language mandated by the Commission's rules. Like the petitioners in the October 30 Order, therefore, National Pen faces the prospect of potentially substantial liability for failing to include in *solicited* faxes the precise opt-out language required by the Commission's rules, even though the Commission has found that there was understandable confusion about the applicability of the requirement for that opt-out language. As a party similarly situated to those petitioners who have been granted waivers, National Pen now asks the Commission to grant it the same retroactive waiver of the same rule for the same reasons that supported a waiver in the October 30 Order.

I. BACKGROUND

Since 1966, National Pen has been one of the nation's top providers of personalized marketing solutions to small businesses. Its principal product is pens, customized with the name of the customer's business and information such as the phone number and website of the business. National Pen also offers customized products like office supplies, drinkware, and calendars to businesses in twenty-two countries that use these products to promote their business and increase customer loyalty.

A. The Telephone Consumer Protection Act And The Commission's Regulations

The Telephone Consumer Protection Act ("TCPA") prohibits the use of any telephone facsimile machine, computer, or other device to send an "unsolicited advertisement" to a fax

machine. 47 U.S.C. § 227(b)(1)(C). The TCPA was amended in 2005 by the Junk Fax Prevention Act (“JFPA”). *See* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005). In relevant part, the JFPA codified an exception for companies that send fax advertisements to those with whom they have an established business relationship. *See* 47 U.S.C. § 227(b)(1)(C)(i).

The Commission amended the rules concerning fax transmissions to reflect the changes brought about by the JFPA. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd. 3787 (2006) (“*Junk Fax Order*”). Particularly relevant here, the *Junk Fax Order* adopted a rule stating that a fax advertisement “sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section.” 47 C.F.R. § 64.1200(a)(4)(iv). At the same time, the *Junk Fax Order* explained in a footnote that “the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.” *Junk Fax Order*, 21 FCC Rcd. at 3810 n.154 (emphasis added).

B. The Commission’s Order Released October 30, 2014

After receiving numerous petitions challenging the application of the opt-out notice requirement to solicited faxes, the Commission issued an Order on October 30, 2014. The Commission recognized that the “inconsistent footnote” in the *Junk Fax Order* “caused confusion or misplaced confidence regarding the applicability of [the opt-out notice] requirement.” October 30 Order at ¶¶ 24, 28. The Commission explained that the footnote “may have caused some parties to misconstrue the Commission’s intent to apply the opt-out notice to fax ads sent with the prior express permission of the recipient.” *Id.* ¶ 24. In addition, the Commission acknowledged the “the lack of explicit notice” in the notice of proposed rulemaking

that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient also “may have contributed to confusion or misplaced confidence.” *Id.* ¶ 25. The Commission concluded that “this specific combination of factors presumptively establishes good cause for retroactive waiver of the rule.” *Id.* ¶ 26. The Commission also found “that granting a retroactive waiver would serve the public interest,” because failure to comply with the rule “could subject parties to potentially substantial damages” and the public interest would not be served by imposing such damages for inadvertent failures to comply with a rule that was confusing. *Id.* ¶ 27.

In light of these findings, the Commission granted a retroactive waiver of Section 64.1200(a)(4)(iv) to those parties who had petitioned for such relief—namely, a group of petitioners composed of businesses “subject to . . . a lawsuit in which a class of plaintiffs seek monetary damages under section 227(b) for alleged violations of the opt-out notice requirement for faxes allegedly sent at the request of the recipient.” *Id.* ¶¶ 6, 29. The Commission stated that “[o]ther, similarly situated parties, may also seek waivers such as those granted in this Order” within six months from the date of the Order. *Id.* ¶ 30.

II. A RETROACTIVE WAIVER IS WARRANTED BECAUSE PETITIONERS ARE SIMILARLY SITUATED TO THE PARTIES WHO RECEIVED WAIVERS IN THE OCTOBER 30 ORDER.

The Commission has the authority to grant a retroactive waiver of its rules pursuant to 47 C.F.R. § 1.3. Here, the Commission has already found that good cause exists for granting a retroactive waiver of Section 64.1200(a)(4)(iv) given confusion surrounding that rule and that the public interest warrants a waiver. National Pen is in exactly the same position as the parties to whom a waiver has already been granted and, thus, a waiver is warranted here as well.

A. The Commission Has Already Found Good Cause For Granting A Retroactive Waiver In These Circumstances.

Under section 1.3 of the Commission's rules, the Commission may suspend, revoke, amend, or waive any of its rules at any time "for good cause shown." 47 C.F.R. § 1.3; *see Nat'l Ass'n of Broadcasters v. FCC*, 569 F.3d 416, 426 (D.C. Cir. 2009). In addition to a showing of "good cause," waiver also requires that the the Commission find that a waiver would be in the public interest. *See* October 30 Order at ¶ 23; *AT&T Corp. v. FCC*, 448 F.3d 426, 433 (D.C. Cir. 2006). As the Commission already found in its October 30 Order, both of these requirements are satisfied in the context of the rule applying the opt-out notice requirement to solicited faxes. *See* October 30 Order at ¶¶ 26-27.

Good cause has been established due to the inconsistent footnote in the *Junk Fax Order*. *Id.* ¶ 24. That footnote indicated that the opt-out notice requirement applies only to *unsolicited* advertisements. *Junk Fax Order*, 21 FCC Rcd. at 3810 n.154. This could reasonably be read to mean that a company like National Pen need not include an opt-out notice when sending advertisements to customers who have expressly agreed to receive the advertisements—that is, *solicited* faxes. *See* October 30 Order at ¶ 24. The Commission's notice of proposed rulemaking also failed to provide explicit notice that the Commission was planning to require the opt-out notice for solicited faxes. *Id.* ¶ 26. As the Commission has already found, "this specific combination of factors presumptively establishes good cause for retroactive waiver of the rule." *Id.*

Furthermore, "granting a retroactive waiver would serve the public interest." *Id.* ¶ 27. Absent a waiver, companies like National Pen could be subjected to substantial monetary damages and forfeitures under the Communications Act for failing to comply with a rule that the Commission has already decided was the subject of confusion. *Id.* By granting a retroactive

waiver, the Commission can ensure that any confusion as to the opt-out notice requirement does not result in the imposition of substantial fines for inadvertent violations. *Id.* The Commission itself has already explained that parties like National Pen need only show that they are “similarly situated” to the petitioners whose waiver petitions were granted to be entitled to a waiver. *Id.* ¶ 30.

B. National Pen Is Similarly Situated To The Petitioners Who Have Already Been Granted Retroactive Waivers.

National Pen is in the same position as the parties to whom the Commission already granted waivers. Like the petitioners who have already been granted waivers, National Pen is the target of a putative class action lawsuit. *See Hicklin Complaint.* The lawsuit asserts the same causes of action against National Pen that were discussed in the Commission’s October 30 Order granting retroactive waivers. Plaintiff alleges that National Pen “sent facsimile transmissions of unsolicited advertisements to Plaintiff and the Class in violation of the JFPA,” *id.* ¶ 2, and cites the opt-out notice requirement, *id.* ¶ 28. Plaintiff seeks “an award of statutory damages in the minimum amount of \$500 for each violation” pursuant to 47 U.S.C. § 227(b)(3). *Id.* ¶ 5.

One of National Pen’s defenses is that it received express permission from recipients before sending faxes. *See* Def.’s Answer to Pl.’s Compl. [Dkt. 23] at 19. Indeed, National Pen intends to demonstrate, through multiple declarations from its customers, that it had received prior express permission from customers before sending faxes. *See, e.g.,* Declarations Attached as Ex. B. The plaintiff, however, asserts that National Pen is “precluded from asserting any prior express permission or invitation because of the failure to comply with the Opt-Out Notice Requirements.” *Hicklin Complaint* at ¶ 30; *see also id.* at ¶ 29D (“The failure of a sender to comply with the Opt-Out Notice Requirements precludes the sender from claiming that a

recipient gave ‘prior express permission or invitation’ to receive the sender’s fax.”). The lawsuit thus seeks to subject National Pen to potentially substantial liability based on the requirement of Section 64.1200(a)(4)(iv) that even solicited faxes must contain the opt-out notice as defined in the Commission’s rules. As a result, National Pen is in precisely the same position as the petitioners in the October 30 Order.

As the Commission has already held, good cause exists for a waiver in these circumstances because the contradictory footnote in the *Junk Fax Order* reasonably caused confusion about whether the opt-out notice requirement applied to solicited faxes. Similarly, subjecting National Pen to substantial monetary damages for acting consistent with the *Junk Fax Order* footnote would not serve the public interest. *See* October 30 Order at ¶ 27. The TCPA and the Commission’s implementing rules are generally intended “to allow consumers to stop unwanted faxes.” *Junk Fax Order*, 21 FCC Rcd. at 3812. But that purpose would not be served by imposing potentially massive penalties on a company like National Pen for sending faxes where the recipients had given their express permission and the only hook for liability is the failure to include precise opt-out language. And that is especially the case where there was confusion surrounding the applicability of the rule requiring that opt out language. Indeed, because the Commission has already granted retroactive waivers to some petitioners who are situated similarly to National Pen, denying a waiver here would be all the more “unjust or inequitable.” October 30 Order at ¶ 28.

CONCLUSION

National Pen finds itself in the same position as those who previously were granted a retroactive waiver of the opt-out notice requirement as applied to solicited faxes. Specifically, it faces a lawsuit that seeks substantial damages for alleged violations of a rule that the

Commission has already recognized created “confusion [and] misplaced confidence.” October 30 Order at ¶ 27. Applying the opt-out notice requirement to solicited faxes under these circumstances would do more harm than good, while granting a retroactive waiver to prevent the imposition of statutory fines for inadvertent violations would “serve[] the public interest.” *Id.* National Pen therefore requests that the Commission grant it the same retroactive waiver of Section 64.1200(a)(4)(iv) that has already been granted to similarly situated parties.

Dated: February 13, 2015

Respectfully submitted,

**NATIONAL PEN CO. LLC,
NATIONAL PEN HOLDINGS, LLC**

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EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

CHRISTOPHER LOWE HICKLIN DC)	
PLC d/b/a Clark Road Chiropractic, a)	
Florida limited liability company,)	
individually and as the representative of a)	
class of similarly-situated persons,)	Civil Action No.:
)	
Plaintiff,)	CLASS ACTION
)	
v.)	
)	
NATIONAL PEN CO. LLC, NATIONAL)	
PEN HOLDINGS, LLC and JOHN DOES)	
1-10,)	
)	
Defendants.)	

CLASS ACTION COMPLAINT

Plaintiff, CHRISTOPHER LOWE HICKLIN DC PLC d/b/a Clark Road Chiropractic, (“Plaintiff”), brings this action on behalf of itself and all others similarly situated, through its attorneys, and except as to those allegations pertaining to Plaintiff or its attorneys, which allegations are based upon personal knowledge, alleges the following upon information and belief against Defendants, PURE BIOMED LLC and JOHN DOES 1-10 (“Defendants”):

PRELIMINARY STATEMENT

1. This case challenges Defendants’ practice of sending unsolicited facsimiles.
2. The federal Telephone Consumer Protection Act of 1991, as amended by the Junk Fax Prevention Act of 2005, 47 USC § 227 (“JFPA” or the “Act”), and the regulations promulgated under the Act, prohibit a person or entity from faxing or having an agent fax advertisements without the recipient’s prior express invitation or permission. The JFPA

provides a private right of action and provides statutory damages of \$500 per violation. Upon information and belief, Defendants have sent facsimile transmissions of unsolicited advertisements to Plaintiff and the Class in violation of the JFPA, including, but not limited to, the facsimile transmissions of seven (7) unsolicited advertisements on or about August 6, 2014, September 9, 2014, September 25, 2014, October 1, 2014, October 8, 2014, October 15, 2014 and October 16, 2014 (“the Faxes”), true and correct copies of which are attached hereto as Exhibit A, and made a part hereof. The Faxes describe the commercial availability of Defendants’ goods and services. Plaintiff is informed and believes, and upon such information and belief avers, that Defendants have sent, and continue to send, unsolicited advertisements via facsimile transmission in violation of the JFPA.

3. Unsolicited faxes damage their recipients. A junk fax recipient loses the use of its fax machine, paper, and ink toner. An unsolicited fax wastes the recipient’s valuable time that would have been spent on something else. A junk fax interrupts the recipient’s privacy. Unsolicited faxes prevent fax machines from receiving authorized faxes, prevent their use for authorized outgoing faxes, cause undue wear and tear on the recipients’ fax machines, and require additional labor to attempt to discern the source and purpose of the unsolicited message.

4. On behalf of itself and all others similarly situated, Plaintiff brings this case as a class action asserting claims against Defendants under the JFPA.

5. Plaintiff is informed and believes, and upon such information and belief avers, that this action is based upon a common nucleus of operative facts because the facsimile transmissions at issue were and are being done in the same or similar manner. This action is

based on the same legal theory, namely liability under the JFPA. This action seeks relief expressly authorized by the JFPA: (i) injunctive relief enjoining Defendants, their employees, agents, representatives, contractors, affiliates, and all persons and entities acting in concert with them, from sending unsolicited advertisements in violation of the JFPA; and (ii) an award of statutory damages in the minimum amount of \$500 for each violation of the JFPA, and to have such damages trebled, as provided by § 227(b)(3) of the Act.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 and 47 U.S.C. § 227.

7. This court has personal jurisdiction over Defendants because Defendants transact business within this judicial district, have made contacts within this judicial district, and/or have committed tortious acts within this judicial district.

PARTIES

8. Plaintiff, CHRISTOPHER LOWE HICKLIN DC PLC, is a Florida limited liability company located within this judicial district doing business as Clark Road Chiropractic.

9. On information and belief, Defendants, NATIONAL PEN CO. LLC and NATIONAL PEN HOLDINGS, LLC, are Delaware limited liability companies with their principal places of business in San Diego, CA.

10. John Does 1-10 will be identified through discovery, but are not presently known.

FACTS

11. On information and belief, on or about August 6, 2014, September 9, 2014, September 25, 2014, October 1, 2014, October 8, 2014, October 15, 2014 and October 16,

2014 Defendants transmitted by telephone facsimile machine seven facsimiles to Plaintiff. Copies of the facsimiles are attached hereto as Exhibit A.

12. Defendants created or made Exhibit A, which Defendants knew or should have known is a good or product which Defendants intended to and did in fact distribute to Plaintiff and the other members of the class.

13. Exhibit A is part of Defendants' work or operations to market Defendants' goods or services which were performed by Defendants and on behalf of Defendants. Therefore, Exhibit A constitutes material furnished in connection with Defendants' work or operations.

14. Plaintiff had not invited or given permission to Defendants to send the fax.

15. On information and belief, Defendants faxed the same and other unsolicited facsimiles without the required opt out language to Plaintiff and more than 25 other recipients without first receiving the recipients' express permission or invitation.

16. There is no reasonable means for Plaintiff (or any other class member) to avoid receiving unauthorized faxes. Fax machines are left on and ready to receive the urgent communications their owners desire to receive.

17. Defendants' facsimile did not display a proper opt-out notice as required by 47 C.F.R. § 64.1200.

CLASS ACTION ALLEGATIONS

18. In accordance with F. R. Civ. P. 23(b)(1), (b)(2) and (b)(3), Plaintiff brings this class action pursuant to the JFPA, on behalf of the following class of persons:

All persons who (1) on or after four years prior to the filing of this action, (2) were sent telephone facsimile messages of

material advertising the commercial availability of any property, goods, or services by or on behalf of Defendants, and (3) which did not display a proper opt-out notice.

Excluded from the Class are the Defendants, their employees, agents and members of the Judiciary. Plaintiff reserves the right to amend the class definition upon completion of class certification discovery.

19. Class Size (F. R. Civ. P. 23(a)(1)): Plaintiff is informed and believes, and upon such information and belief avers, that the number of persons and entities of the Plaintiff Class is numerous and joinder of all members is impracticable. Plaintiff is informed and believes, and upon such information and belief avers, that the number of class members is at least forty.

20. Commonality (F. R. Civ. P. 23 (a) (2)): Common questions of law and fact apply to the claims of all class members. Common material questions of fact and law include, but are not limited to, the following:

- a) Whether the Defendants sent unsolicited fax advertisements;
- b) Whether the Defendants' faxes advertised the commercial availability of property, goods, or services;
- c) The manner and method the Defendants used to compile or obtain the list of fax numbers to which they sent Exhibit A and other unsolicited faxed advertisements;
- d) Whether the Defendants faxed advertisements without first obtaining the recipient's prior permission or invitation;
- e) Whether the Defendants sent the faxed advertisements knowingly;
- f) Whether the Defendants violated the provisions of 47 U.S.C. § 227 and the regulations promulgated thereunder;

g) Whether the faxes contain an “opt-out notice” that complies with the requirements of § (b)(1)(C)(iii) of the Act, and the regulations promulgated thereunder, and the effect of the failure to comply with such requirements;

h) Whether the Defendants should be enjoined from faxing advertisements in the future;

i) Whether the Plaintiff and the other members of the class are entitled to statutory damages; and

j) Whether the Court should award treble damages.

21. Typicality (F. R. Civ. P. 23 (a) (3)): The Plaintiff's claims are typical of the claims of all class members. The Plaintiff received the same faxes as the faxes sent by or on behalf of the Defendants advertising goods and services of the Defendants during the Class Period. The Plaintiff is making the same claims and seeking the same relief for itself and all class members based upon the same federal statute. The Defendants have acted in the same or in a similar manner with respect to the Plaintiff and all the class members by sending Plaintiff and each member of the class the same faxes.

22. Fair and Adequate Representation (F. R. Civ. P. 23 (a) (4)): The Plaintiff will fairly and adequately represent and protect the interests of the class. It is interested in this matter, has no conflicts and has retained experienced class counsel to represent the class.

23. Need for Consistent Standards and Practical Effect of Adjudication (F. R. Civ. P. 23 (b) (1)): Class certification is appropriate because the prosecution of individual actions by class members would: (a) create the risk of inconsistent adjudications that could establish incompatible standards of conduct for the Defendants, and/or (b) as a practical matter, adjudication of the Plaintiff's claims will be dispositive of the interests of class members who are

not parties.

24. Common Conduct (F. R. Civ. P. 23 (b) (2)): Class certification is also appropriate because the Defendants have acted and refused to act in the same or similar manner with respect to all class members thereby making injunctive and declaratory relief appropriate. The Plaintiff demands such relief as authorized by 47 U.S.C. §227.

25. Predominance and Superiority (F. R. Civ. P. 23 (b) (3)): Common questions of law and fact predominate over any questions affecting only individual members, and a class action is superior to other methods for the fair and efficient adjudication of the controversy because:

- a) Proof of the claims of the Plaintiff will also prove the claims of the class without the need for separate or individualized proceedings;
- b) Evidence regarding defenses or any exceptions to liability that the Defendants may assert and attempt to prove will come from the Defendants' records and will not require individualized or separate inquiries or proceedings;
- c) The Defendants have acted and are continuing to act pursuant to common policies or practices in the same or similar manner with respect to all class members;
- d) The amount likely to be recovered by individual class members does not support individual litigation. A class action will permit a large number of relatively small claims involving virtually identical facts and legal issues to be resolved efficiently in one (1) proceeding based upon common proofs; and
- e) This case is inherently manageable as a class action in that:
 - (i) The Defendants identified persons or entities to receive the fax transmissions and it is believed that the Defendants' computer and business records will

enable the Plaintiff to readily identify class members and establish liability and damages;

(ii) Liability and damages can be established for the Plaintiff and the class with the same common proofs;

(iii) Statutory damages are provided for in the statute and are the same for all class members and can be calculated in the same or a similar manner;

(iv) A class action will result in an orderly and expeditious administration of claims and it will foster economics of time, effort and expense;

(v) A class action will contribute to uniformity of decisions concerning the Defendants' practices; and

(vi) As a practical matter, the claims of the class are likely to go unaddressed absent class certification.

Claim for Relief for Violation of the JFPA, 47 U.S.C. § 227 *et seq.*

26. The JFPA makes it unlawful for any person to “use any telephone facsimile machine, computer or other device to send, to a telephone facsimile machine, an unsolicited advertisement” 47 U.S.C. § 227(b)(1)(C).

27. The JFPA defines “unsolicited advertisement” as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.” 47 U.S.C. § 227 (a) (5).

28. **Opt-Out Notice Requirements.** The JFPA strengthened the prohibitions against the sending of unsolicited advertisements by requiring, in § (b)(1)(C)(iii) of the Act, that senders of faxed advertisements place a clear and conspicuous notice on the first page of the transmission

that contains the following among other things (hereinafter collectively the “Opt-Out Notice Requirements”):

1. a statement that the recipient is legally entitled to opt-out of receiving future faxed advertisements – knowing that he or she has the legal right to request an opt-out gives impetus for recipients to make such a request, if desired;
2. a statement that the sender must honor a recipient’s opt-out request within 30 days and the sender’s failure to do so is unlawful – thereby encouraging recipients to opt-out, if they did not want future faxes, by advising them that their opt-out requests will have legal “teeth”;
3. a statement advising the recipient that he or she may opt-out with respect to all of his or her facsimile telephone numbers and not just the ones that receive a faxed advertisement from the sender – thereby instructing a recipient on how to make a valid opt-out request for all of his or her fax machines.

The requirement of (1) above is incorporated from § (b)(D)(ii) of the Act. The requirement of (2) above is incorporated from § (b)(D)(ii) of the Act and the rules and regulations of the Federal Communications Commission (the “FCC”) in ¶ 31 of its 2006 Report and Order (*In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act, Junk Prevention Act of 2005*, 21 F.C.C.R. 3787, 2006 WL 901720, which rules and regulations took effect on August 1, 2006). The requirements of (3) above are contained in § (b)(2)(E) of the Act and incorporated into the Opt-Out Notice Requirements via § (b)(2)(D)(ii). Compliance with the Opt-Out Notice Requirements is neither difficult nor costly. The Opt-Out Notice Requirements are important consumer protections bestowed by Congress upon the owners of the telephone lines and fax machines giving them the right, and means, to stop

unwanted faxed advertisements.

29. **2006 FCC Report and Order.** The JFPA, in § (b)(2) of the Act, directed the FCC to implement regulations regarding the JFPA, including the JFPA's Opt-Out Notice Requirements and the FCC did so in its 2006 Report and Order, which in addition provides among other things:

A. The definition of, and the requirements for, an established business relationship for purposes of the first of the three prongs of an exemption to liability under § (b)(1)(C)(i) of the Act and provides that the lack of an "established business relationship" precludes the ability to invoke the exemption contained in § (b)(1)(C) of the Act (*See* 2006 Report and Order ¶¶ 8-12 and 17-20);

B. The required means by which a recipient's facsimile telephone number must be obtained for purposes of the second of the three prongs of the exemption under § (b)(1)(C)(ii) of the Act and provides that the failure to comply with these requirements precludes the ability to invoke the exemption contained in § (b)(1)(C) of the Act (*See* 2006 Report and Order ¶¶ 13-16);

C. The things that must be done in order to comply with the Opt-Out Notice Requirements for the purposes of the third of the three prongs of the exemption under § (b)(1)(C)(iii) of the Act and provides that the failure to comply with these requirements precludes the ability to invoke the exemption contained in § (b)(1)(C) of the Act (*See* 2006 Report and Order ¶¶ 24-34);

D. The failure of a sender to comply with the Opt-Out Notice Requirements precludes the sender from claiming that a recipient gave "prior express permission or invitation" to receive the sender's fax (*See* Report and Order ¶ 48);

As a result thereof, a sender of a faxed advertisement who fails to comply with the Opt-Out Notice Requirements has, by definition, transmitted an unsolicited advertisement under the JFPA. This is because such a sender can neither claim that the recipients of the faxed advertisement gave “prior express permission or invitation” to receive the fax nor can the sender claim the exemption from liability contained in § (b)(C)(1) of the Act.

30. **The Faxes** Defendants sent the on or about August 6, 2014, September 9, 2014, September 25, 2014, October 1, 2014, October 8, 2014, October 15, 2014 and October 16, 2014, advertisements via facsimile transmission from telephone facsimile machines, computers, or other devices to the telephone lines and facsimile machines of Plaintiff and members of the Plaintiff Class. The Faxes constituted advertisements under the Act. Defendants failed to comply with the Opt-Out Requirements in connection with the Faxes. The Faxes were transmitted to persons or entities without their prior express permission or invitation and/or Defendants are precluded from asserting any prior express permission or invitation because of the failure to comply with the Opt-Out Notice Requirements. By virtue thereof, Defendants violated the JFPA and the regulations promulgated thereunder by sending the Faxes via facsimile transmission to Plaintiff and members of the Class.

31. **Defendants’ Other Violations.** Plaintiff is informed and believes, and upon such information and belief avers, that during the period preceding four years of the filing of this Complaint and repeatedly thereafter, Defendants have sent via facsimile transmission from telephone facsimile machines, computers, or other devices to telephone lines and facsimile machines of members of the Plaintiff Class faxes that constitute advertisements under the JFPA that were transmitted to persons or entities without their prior express permission or invitation (and/or that Defendants are precluded from asserting any prior express permission or invitation

because of the failure to comply with the Opt-Out Notice Requirements in connection with such transmissions). By virtue thereof, Defendants violated the JFPA and the regulations promulgated thereunder. Plaintiff is informed and believes, and upon such information and belief avers, that Defendants may be continuing to send unsolicited advertisements via facsimile transmission in violation of the JFPA and the regulations promulgated thereunder, and absent intervention by this Court, will do so in the future.

32. The TCPA/JFPA provides a private right of action to bring this action on behalf of Plaintiff and the Plaintiff Class to redress Defendants' violations of the Act, and provides for statutory damages. 47 U.S.C. § 227(b)(3). The Act also provides that injunctive relief is appropriate. *Id.*

33. The JFPA is a strict liability statute, so the Defendants are liable to the Plaintiff and the other class members even if their actions were only negligent.

34. The Defendants knew or should have known that (a) the Plaintiff and the other class members had not given express invitation or permission for the Defendants or anybody else to fax advertisements about the Defendants' goods or services; (b) the Plaintiff and the other class members did not have an established business relationship; (c) Defendants transmitted advertisements; (d) the Faxes did not contain the required Opt-Out Notice; and (e) Defendants' transmission of advertisements that did not contain the required opt-out notice was unlawful.

35. The Defendants' actions caused damages to the Plaintiff and the other class members. Receiving the Defendants' junk faxes caused the recipients to lose paper and toner consumed in the printing of the Defendants' faxes. Moreover, the Defendants' faxes used the Plaintiff's and the other class members' telephone lines and fax machine. The Defendants' faxes cost the Plaintiff and the other class members time, as the Plaintiff and the other class members

and their employees wasted their time receiving, reviewing and routing the Defendants' unauthorized faxes. That time otherwise would have been spent on the Plaintiff's and the other class members' business activities. The Defendants' faxes unlawfully interrupted the Plaintiff's and other class members' privacy interests in being left alone. Finally, the injury and property damage sustained by Plaintiff and the other class members from the sending of Defendants' advertisements occurred outside of Defendants' premises.

WHEREFORE, Plaintiff, CHRISTOPHER LOWE HICKLIN DC PLC d/b/a Clark Road Chiropractic, individually and on behalf of all others similarly situated, demands judgment in its favor and against Defendants, NATIONAL PEN CO. LLC, NATIONAL PEN HOLDINGS, LLC and JOHN DOES 1-10, jointly and severally, as follows:

A. That the Court adjudge and decree that the present case may be properly maintained as a class action, appoint the Plaintiff as the representative of the class, and appoint the Plaintiff's counsel as counsel for the class;

B. That the Court award actual monetary loss from such violations or the sum of five hundred dollars (\$500.00) for each violation, whichever is greater;

C. That Court enjoin the Defendants from additional violations; and

D. That the Court award pre-judgment interest, costs, and such further relief as the Court may deem just and proper.

Respectfully submitted,

CHRISTOPHER LOWE HICKLIN DC PLC d/b/a
Clark Road Chiropractic, individually and as the
representative of a class of similarly-situated
persons,

By: s/ Ryan M. Kelly
Ryan M. Kelly – FL Bar No.: 90110

Ryan M. Kelly
ANDERSON + WANCA
3701 Algonquin Road, Suite 760
Rolling Meadows, IL 60008
Telephone: 847-368-1500
Fax: 847-368-1501
rkelly@andersonwanca.com

JS 44 (Rev 09/10)

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA**

CIVIL COVER SHEET

This automated JS-44 conforms generally to the manual JS-44 approved by the Judicial Conference of the United States in September 1974. The data is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. The information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law.

Plaintiff(s):

First Listed Plaintiff:

Christopher Lowe Hicklin DC PLC d/b/a Clark Road Chiropractic ;

County of Residence: Sarasota County

Defendant(s):

First Listed Defendant:

National Pen Co. LLC ;

County of Residence: Outside This District

Additional Defendants(s):

National Pen Holdings, LLC ;

John Does 1-10 ;

County Where Claim For Relief Arose: Sarasota County

Plaintiff's Attorney(s):

Attorney Ryan M Kelly (Christopher Lowe Hicklin DC PLC d/b/a Clark Road Chiropractic)

Anderson + Wanca

3701 Algonquin Road, Suite 760

Rolling Meadows, Illinois 60008

Phone: 847-368-1500

Fax: 847-368-1501

Email: rkelly@andersonwanca.com

Defendant's Attorney(s):

Basis of Jurisdiction: 3. Federal Question (U.S. not a party)

Citizenship of Principal Parties (Diversity Cases Only)

Plaintiff: N/A

Defendant: N/A

Origin: 1. Original Proceeding

Nature of Suit: 890 Other Statutory Actions

Cause of Action: Violation of 47 U.S.C. Sec. 227 - Violation of the Telephone Consumer Protection Act

Requested in Complaint

Class Action: Class Action Under FRCP23

Monetary Demand (in Thousands):

Jury Demand: No

Related Cases: Is NOT a refiling of a previously dismissed action

Signature: s/ Ryan M. Kelly

Date: 10/14/2014

If any of this information is incorrect, please close this window and go back to the Civil Cover Sheet Input form to make the correction and generate the updated JS44. Once corrected, print this form, sign and date it, and submit it with your new civil action.

EXHIBIT A

NATIONAL PEN COMPANY*Your image is our business!*™**LAST CHANCE TO LOCK-IN
SUPER LOW SAVINGS!**

Bright LED Light

**Special Offer Reserved For**
CLARK ROAD CHIROPRACTIC CTR

Take this opportunity to **SAVE BIG** on the **Ultra Bright LED Flashlight and Key Chain** during our **LAST CHANCE TO SAVE SALE!** Take advantage of these great LED Flashlight prices and boost sales and customer goodwill all year long!

And here's our special 10-Day Offer Reserved for
CLARK ROAD CHIROPRACTIC CTR

**BUY 50
LED FLASHLIGHT
KEY CHAINS
FOR ONLY
99¢ EACH!**

- **Personalized** with your lifetime laser engraved message!
- **Low minimum** and low, low price on our bestselling flashlight!
- **Available In** Blue, Black, Red, Purple, Gunmetal or **FREE Assortment!**

Hurry, place your order in the next 10 days, before supplies of the new LED Flashlight Key Chains are gone!

TO ORDER:

FAX the completed order form below to **800-854-7367** or

CALL me at **800-854-1000** or for fastest delivery go

ONLINE to **www.orderpens.com**. Enter your promo code: **2HTHES5B**

Sincerely,
Dave Thompson

Order today and get
FREE Gift Boxes
with your order!

☒ **YES!** Please rush my new **PERSONALIZED LED FLASHLIGHT KEY CHAINS**. Bill me later. My satisfaction is 100% guaranteed!

Special Offer!

1. QUANTITY (Check one only)	<input type="checkbox"/> 50	<input type="checkbox"/> 100	<input type="checkbox"/> 200	<input type="checkbox"/> 250	<input type="checkbox"/> 500	<input type="checkbox"/> 1000
Regular Price	\$1.59 ea.	\$1.56 ea.	\$1.54 ea.	\$1.52 ea.	\$1.49 ea.	\$1.45 ea.
Sale Price	99¢ ea.	99¢ ea.	99¢ ea.	99¢ ea.	99¢ ea.	99¢ ea.

2. Your Personalized Imprint

DR. CHRIS HICKLIN
3220 Clark Rd., Sarasota, FL
(941) 923-4357

3. Color Choice

☐ Purple ☐ Red ☐ Black ☐ Blue ☐ Gunmetal ☐ Assorted

★ C15926504ES5B01 ★
FAYE HICKLIN
CLARK ROAD CHIROPRACTIC
CTR
3220 CLARK RD
SARASOTA, FL 34231
941-923-4357 8/6/14

Or Make Imprint Changes Here...

Up to 3 lines, 28 characters/spaces per line. Your Imprint will be in all caps unless otherwise indicated below. Add your logo for just \$40. Please supply clean black & white artwork.

1. _____

2. _____

3. _____

4. Ordered By Name and valid Phone Number required to process order.

()

PRINT Your Name

Area Code Day Phone Number

Fax Number

Please allow a \$15.95 set up charge plus delivery/handling charge.
If you would like to be removed from receiving future faxes, please call 855-684-2505

ORDER FORM
Toll Free Fax:
800-854-PENS
(7367)
Call toll free: 800-854-1000

342 Shelbyville Mills Road
Shelbyville, TN 37160
DR-1496

NATIONAL PEN COMPANY
Your image is our business!

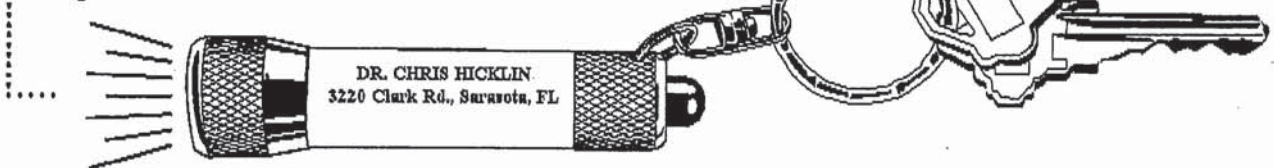


NATIONAL PEN COMPANY
*Your image is our business!*TM

END OF SUMMER SALE!!!

Take advantage of these great **Ultra Bright LED Flashlight and Key Chain** prices and boost sales and customer goodwill all year long during our **END OF SUMMER SALE!**

Bright LED Light



Hurry, place your order in the next 10 days, before supplies of the new LED Flashlight Key Chains are gone!

And here's our Special 10-Day Offer Reserved for

CLARK ROAD CHIROPRACTIC CTR

• **Personalized** with your lifetime laser engraved message!

• **Low minimum** and low, low price on our bestselling flashlight!

• **Available in** Blue, Black, Red, Purple, Gunmetal or **FREE Assortment!**

TO ORDER:

FAX the completed order form below to **800-854-7367** or

CALL me at **800-854-1000** or for fastest delivery go

ONLINE to **www.orderpens.com**. Enter your promo code: **2JZZEV1B**

Order today and get
FREE Gift Boxes
 with your order!

Sincerely,
 Dave Thompson

ORDER FORM
 Toll Free Fax:
800-854-PENS (7367)
 Call toll free: 800-854-1000

UTR-1510



YES!

Please rush my new **PERSONALIZED LED FLASHLIGHT KEY CHAINS**.
 Bill me later. My satisfaction is 100% guaranteed!

Summer Sale!

1. QUANTITY (Check one only)	<input type="checkbox"/> 50	<input type="checkbox"/> 100	<input type="checkbox"/> 200	<input type="checkbox"/> 250	<input type="checkbox"/> 500	<input type="checkbox"/> 1000
Regular Price	\$1.59 ea.	\$1.56 ea.	\$1.54 ea.	\$1.52 ea.	\$1.49 ea.	\$1.45 ea.
Sale Price	99¢ ea.	99¢ ea.	99¢ ea.	99¢ ea.	99¢ ea.	99¢ ea.

2. Your Personalized Imprint

DR. CHRIS HICKLIN
 3220 Clark Rd., Sarasota, FL
 (941) 923-4357

Or Make Imprint Changes Here...

Up to 3 lines, 28 characters/spaces per line. Your imprint will be in all caps unless otherwise indicated below. Add your logo for just \$40. Please supply clean black & white artwork.

1.
2.
3.

3. Color Choice

☐ Purple ☐ Red ☐ Black ☐ Blue ☐ Gunmetal ☐ Assorted

★ **C15926504EV1B01** ★

FAYE HICKLIN
 CLARK ROAD CHIROPRACTIC
 CTR
 3220 CLARK RD
 SARASOTA, FL 34231
 941-923-4357

LAK 9/9/14

4. Ordered By Name and valid Phone Number required to process order.

PRINT Your Name	()	Area Code	Day Phone Number	Fax Number
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Please allow a \$15.95 set up charge plus delivery/handling charge.
 If you would like to be removed from receiving future faxes, please call 855-684-2505

NATIONAL PEN COMPANY
Your image is our business!™

**ALLURE PENS
 LESS THAN
 30¢ NET EA!**

FALL INTO SAVINGS EVENT!

Take advantage of these great **Allure Pen** prices and boost sales and customer goodwill all year long during our FALL INTO SAVINGS EVENT!



Hurry, place your order in the next 10 days, before supplies of the new Allure Pen are gone!

And here's our Special 10-Day Offer Reserved for

CLARK ROAD CHIROPRACTIC CTR

• **Pay Only 30¢ Net Each!...** Depending on quantity!

• **Low minimum** and low, low price on our bestselling pen!

• **Available in** Green, Pink, Orange, Yellow tips & tops with matching imprint or **FREE Assortment!**

TO ORDER:

FAX the completed order form below to **800-854-7367** or

CALL me at **800-854-1000** or for fastest delivery go

ONLINE to **www.orderpens.com**. Enter your promo code: **4MNEMEX9B**

Sincerely,
 Dave Thompson

Order Today for the
**LOWEST PRICE
 OF THE YEAR**
 Hurry, offer expires
 in 10 days!

ORDER FORM
 Toll Free Fax:
**800-854-PENS
 (7367)**
 Call toll free: **800-854-1000**

DIR-525

NATIONAL PEN COMPANY 342 Shelbyville Mills Road
 Shelbyville, TN 37160
Your image is our business!

☒ **YES!** Please rush my new PERSONALIZED ALLURE PENS. Bill me later. My satisfaction is 100% guaranteed!

1. Quantity

- ☐ 100 @ 89¢ + 200 FREE
☐ 150 @ 89¢ + 300 FREE
☐ 250 @ 89¢ + 500 FREE
☐ 500 @ 89¢ + 1000 FREE

2. Pen Trim Colors (Check one only)

- ☐ Assorted with White Imprint -- No Extra Charge
☐ Assorted with Rainbow Imprint -- Add 5¢ extra per pen, including FREE pens
☐ Assorted with Silver Imprint -- No Extra Charge
☐ Neon Green
☐ Neon Pink
☐ Neon Orange
☐ Neon Yellow

★ **C15926504EX9B01** ★

FAYE HICKLIN
 CLARK ROAD CHIROPRACTIC CTR
 3220 CLARK RD
 SARASOTA, FL 34231
 941-923-4357

ALL

9/29/14

3. Your Personalized Imprint **Fall Sale Event!**

DR. CHRIS HICKLIN
 3220 Clark Rd., Sarasota, FL
 (941) 923-4357

Or Make Imprint Changes Here...

Up to 5 lines, 35 characters/spaces per line • Your Imprint will be in all caps unless otherwise indicated below • Add your logo for just \$25. Please supply clean black & white artwork.

1.
2.
3.
4.
5.

4. Ink Color

- ☐ Blue ☐ Black

5. Ordered By Name and valid Phone Number required to process order.

	()	
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PRINT Your Name

Area Code Day Phone Number

Fax Number

Please allow a \$15.95 set up charge plus delivery/handling charge.
 If you would like to be removed from receiving future faxes, please call 855-684-2505

NATIONAL PEN COMPANY
Your image is our business!™

OUR PRICES KEEP FALLING!

Special Offer Reserved For
CLARK ROAD CHIROPRACTIC CTR



Take this opportunity to **SAVE BIG** on the **Ventus Pen** during our **FALLING PRICES SALE!**
 Take advantage of these great Ventus Pen prices and boost sales and customer goodwill all year long!



And here's our special 10-Day Offer Reserved for
CLARK ROAD CHIROPRACTIC CTR

- **Innovative Design...**Colorful translucent barrels, matching vented rubber grip and shiny chrome accents.
- **Long Lasting Imprint...**Guaranteed to be crisp!
- **Pay Only 49¢ Each!**...Regardless of quantity!

Hurry, place your order in the next 10 days, before supplies of the new Ventus Pen Pens are gone!

TO ORDER:

FAX the completed order form below to **800-854-7367** or
 CALL me at **800-854-1000** or for fastest delivery go
 ONLINE to **www.orderpens.com**. Enter your promo code: **6K8KEX9C**

Sincerely,
 Dave Thompson

Order today and get our
LOWEST PRICE OF THE YEAR!
 Hurry, offer expires in 10 days!

ORDER FORM
 Toll Free Fax: 800-854-PENS (7367)
 Call toll free 800-854-1000

CR-1526
 NATIONAL PEN COMPANY
 342 Shelbyville Mills Road
 Shelbyville, TN 37160

☒ **YES!** Please rush my new PERSONALIZED VENTUS PEN PENS.
 Bill me later. My satisfaction is 100% guaranteed!

Fall Savings

1. QUANTITY (Check one only)	<input type="checkbox"/> 100	<input type="checkbox"/> 150	<input type="checkbox"/> 250	<input type="checkbox"/> 500	<input type="checkbox"/> 1000
Regular Price	98¢ ea.	96¢ ea.	94¢ ea.	92¢ ea.	90¢ ea.
Sale Price	49¢ ea.	49¢ ea.	49¢ ea.	49¢ ea.	49¢ ea.

2. Your Personalized Imprint

CLARK ROAD CHIROPRACTIC CTR
 3220 CLARK RD
 SARASOTA, FL 34231

Or Make Imprint Changes Here...

Up to 5 lines, 27 characters/spaces per line. Your Imprint will be in all caps unless otherwise indicated below. Add your logo for just \$25. Please supply clean black & white artwork.

1.	
2.	
3.	
4.	
5.	

3. Translucent Trim Color

☐ Black ☐ Blue ☐ Red ☐ Purple ☐ Assorted Black Ink, medium point only.

★ C15926504EX9C01 ★
 FAYE HICKLIN
 CLARK ROAD CHIROPRACTIC
 CTR
 3220 CLARK RD
 SARASOTA, FL 34231
 FVN 941-923-4357 10/1/14

4. Ordered By Name and valid Phone Number required to process order.

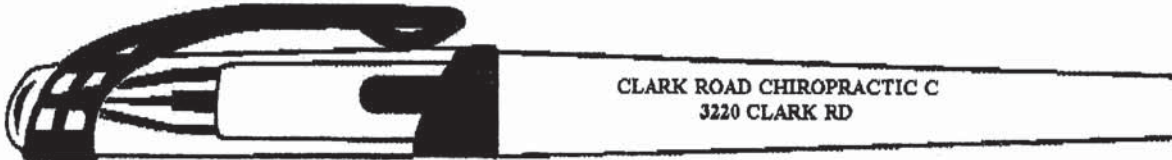
PRINT Your Name	()	Area Code	Day Phone Number	Fax Number
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Please allow a \$15.95 set up charge plus delivery/handling charge.
 If you would like to be removed from receiving future faxes, please call 855-684-2505

NATIONAL PEN COMPANY
Your image is our business!™

"RAKE-IN" THE SAVINGS!

Special Offer Reserved For
CLARK ROAD CHIROPRACTIC CTR



Take this opportunity to **SAVE BIG** on the **Metro Gel Pen** during our **FALLING PRICES SALE!**
 Take advantage of these great Metro Gel Pen prices and boost sales and customer goodwill all year long!

And here's our special 10-Day Offer Reserved for
CLARK ROAD CHIROPRACTIC CTR



- **Easy-Writing Gel Ink...** Your customers won't put this pen down!
- **Innovative Design...** Black clip with 8 cut-outs accent a clear cap for an upscale, metropolitan flair.
- **Long Lasting Imprint...** Guaranteed to be crisp!
- **Pay Only 49¢ Each!**...Regardless of quantity!

Hurry, place your order in the next 10 days, before supplies of the new Metro Gel Pen Pens are gone!

TO ORDER:

FAX the completed order form below to **800-854-7367** or
 CALL me at **800-854-1000** or for fastest delivery go
 ONLINE to **www.orderpens.com**. Enter your promo code: **5749EX9D**

Sincerely,
 Dave Thompson

Order today and get our
LOWEST PRICE OF THE YEAR!
 Hurry, offer expires in 10 days!

ORDER FORM
 Toll Free Fax:
800-854-PENS (7367)
 Call toll free: 800-854-1000
 NATIONAL PEN COMPANY 342 Shelbyville Mills Road
 Shelbyville, TN 37160 CTR-1527

☒ **YES!** Please rush my new **PERSONALIZED METRO GEL PEN PENS**.
 Bill me later. My satisfaction is 100% guaranteed!

Fall Savings

1. QUANTITY (Check one only)	<input type="checkbox"/> 100	<input type="checkbox"/> 150	<input type="checkbox"/> 250	<input type="checkbox"/> 500	<input type="checkbox"/> 1000
Regular Price	98¢ ea.	96¢ ea.	94¢ ea.	92¢ ea.	90¢ ea.
Sale Price	49¢ ea.	49¢ ea.	49¢ ea.	49¢ ea.	49¢ ea.

2. Your Personalized Imprint

CLARK ROAD CHIROPRACTIC C
 3220 CLARK RD
 SARASOTA, FL 34231

Or Make Imprint Changes Here...

Up to 3 lines, 25 characters/spaces per line. Your Imprint will be in all caps unless otherwise indicated below. Add your logo for just \$25. Please supply clean black & white artwork.

1. _____
 2. _____
 3. _____

3. Trim Color

☐ Black ☐ Blue ☐ Red ☐ Purple ☐ Assorted

4. Ink Color

☐ Black ☐ Blue

★ **C15926504EX9D01** ★
 FAYE HICKLIN
 CLARK ROAD CHIROPRACTIC
 CTR
 3220 CLARK RD
 SARASOTA, FL 34231
 941-923-4367 10/8/14
 PTH

5. Ordered By Name and valid Phone Number required to process order.

 ()

PRINT Your Name

Area Code

Day Phone Number

Fax Number

Please allow a \$15.95 set up charge plus delivery/handling charge.
 If you would like to be removed from receiving future faxes, please call 855-684-2505

NATIONAL PEN COMPANY
Your image is our business!™

ROCK BOTTOM SALE!
BIG SAVINGS!

Big Savings Offer Reserved for
CLARK ROAD CHIROPRACTIC CTR

Bright LED Light



Last chance to take advantage of **BIG SAVINGS** on the **Ultra Bright LED Flashlight and Key Chain** before prices go up! The LED Flashlight will boost sales and customer goodwill....but you must order today to avoid spending more later!

America's Favorite Advertising Product!

UP TO
55% OFF
THE BIG ROCK BOTTOM
SALE!

And here's our special 10-Day Offer Reserved for
CLARK ROAD CHIROPRACTIC CTR

- **Personalized** with your lifetime laser engraved message!
- **Low minimum** and low, low price on our bestselling flashlight!
- **Available In** Blue, Black, Red, Purple, Gunmetal or **FREE Assortment!**

Hurry, place your order in the next 10 days, before supplies of the new LED Flashlight Key Chains are gone!

TO ORDER:

FAX the completed order form below to **800-854-7367** or

CALL me at **800-854-1000** or for fastest delivery go

ONLINE to **www.orderpens.com**. Enter your promo code: **2GTXEY2B**

Sincerely,
Dave Thompson

Order today and get
FREE Gift Boxes
with your order!

ORDER FORM
Toll Free Fax:
800-854-PENS (7367)
Call toll free: **800-854-1000**
NATIONAL PEN COMPANY
342 Shelbyville Mills Road
Shelbyville, TN 37160
(JTR-1540)

☒ **YES!** Please rush my new **PERSONALIZED LED FLASHLIGHT KEY CHAINS**. Bill me later. My satisfaction is 100% guaranteed!

Rock Bottom Sale!

1. QUANTITY (Check one only)	<input type="checkbox"/> 50	<input type="checkbox"/> 100	<input type="checkbox"/> 200	<input type="checkbox"/> 250	<input type="checkbox"/> 500	<input type="checkbox"/> 1000
Regular Price	\$2.20 ea.	\$2.18 ea.	\$2.16 ea.	\$2.14 ea.	\$2.12 ea.	\$2.09 ea.
Sale Price	99¢ ea.	99¢ ea.	99¢ ea.	99¢ ea.	99¢ ea.	99¢ ea.

2. Your Personalized Imprint

DR. CHRIS HICKLIN
3220 Clark Rd., Sarasota, FL
(941) 923-4367

Or Make Imprint Changes Here...

Up to 3 lines, 28 characters/spaces per line • Your Imprint will be in all caps unless otherwise indicated below • Add your logo for just \$40. Please supply clean black & white artwork.

1. _____

2. _____

3. _____

3. Color Choice

☐ Purple ☐ Red ☐ Black ☐ Blue ☐ Gunmetal ☐ Assorted

★ C15926504EY2B01 ★
FAYE HICKLIN
CLARK ROAD CHIROPRACTIC
CTR
3220 CLARK RD
SARASOTA, FL 34231
LAK 841-923-4367 10/15/14

4. Ordered By Name and valid Phone Number required to process order.

PRINT Your Name Area Code Day Phone Number Fax Number

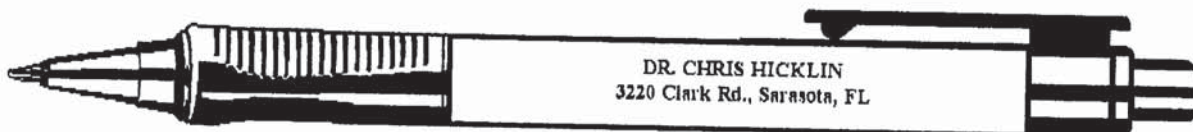
Please allow a \$15.95 set up charge plus delivery/handling charge.
If you would like to be removed from receiving future faxes, please call 855-684-2505

NATIONAL PEN COMPANY
Your image is our business!™

CONTOUR PENS
 AS LOW AS
 45¢ EACH!

SPOOKY SAVINGS!

Take advantage of these great **Contour Pen** prices and boost sales and customer goodwill all year long during our SPOOKY SAVINGS EVENT!



Hurry, place your order in the next 10 days, before supplies of the Contour Pen are gone!

And here's our Special 10-Day Offer Reserved for

CLARK ROAD CHIROPRACTIC CTR

- Pay Only 45¢ Each!...Depending on quantity!
- Low minimum and low, low price on our bestselling pen!
- Available in...FULL-Color designs or solid colors!

TO ORDER:

FAX the completed order form below to **800-854-7367** or
 CALL me at **800-854-1000** or for fastest delivery go
 ONLINE to **www.orderpens.com**. Enter your promo code: **5566EX9F**

Sincerely,
 Dave Thompson



ORDER FORM
 Toll Free Fax: 800-854-PENS (7367)
 Call toll free 800-854-1000
 NATIONAL PEN COMPANY 342 Shelbyville Mills Road
 Shelbyville, TN 37160

☒ **YES!** Please rush my new PERSONALIZED CONTOUR PENS.
 Bill me later. My satisfaction is 100% guaranteed!

1. Quantity

<input type="checkbox"/> 100 @	\$1.45	49¢ ea.
<input type="checkbox"/> 150 @	\$1.45	48¢ ea.
<input type="checkbox"/> 250 @	\$1.45	47¢ ea.
<input type="checkbox"/> 500 @	\$1.39	46¢ ea.
<input type="checkbox"/> 1,000 @	\$1.35	45¢ ea.

2. Design (Check one only)

- ☐ Red Sparkler Holographic (NWY)
☐ Thank You for Choosing (CBI)
☐ We'll Keep You Smiling (IPY)
☐ We Don't Monkey Around (PG9)
☐ Compliments Of (HHD)
☐ Star Spangled Banner (HZ1)
☐ Other: _____ (list design code & name)

★ C15926504EX9F01 ★
 FAYE HICKLIN
 CLARK ROAD CHIROPRACTIC
 CTR
 3220 CLARK RD
 SARASOTA, FL 34231 10/15/14
 841-823-4357

3. Your Personalized Imprint **SPOOKY SAVINGS!**

DR. CHRIS HICKLIN
 3220 Clark Rd., Sarasota, FL
 (941) 923-4357

Or Make Imprint Changes Here...

Up to 5 lines, 35 characters/spaces per line. Your imprint will be in all caps unless otherwise indicated below.
 Add your logo for just \$25. Please supply clean black & white artwork.

1.
2.
3.
4.
5.

4. Ink Color

- ☐ Blue ☐ Black

5. Ordered By

Name and valid Phone Number required to process order.

PRINT Your Name	()	Area Code	Day Phone Number	Fax Number
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Please allow a \$15.95 set up charge plus delivery/handling charge.
 If you would like to be removed from receiving future faxes, please call 855-684-2505

EXHIBIT B

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA**

TAMPA DIVISION

AFFIDAVIT OF JOHN H. HEYDT

NOVEMBER 25, 2014

1. My name is John H. Heydt, and I am the President and General Manager at Anti-Seize Technology in Franklin Park, IL. I am submitting this affidavit to discuss my relationship with National Pen.

2. My company has been purchasing pens with our name and logo imprinted on them from National Pen for many years. We use these pens as a promotional device, handing them out at trade shows, during Christmas giveaways, or when our sales people make visits or presentations to actual or prospective customers. I feel that the pens we buy from National Pen are a valuable marketing tool that fortifies and enhances my company's image by keeping my name in front of customers. It's a good way for your business to stay in a customer's mind.

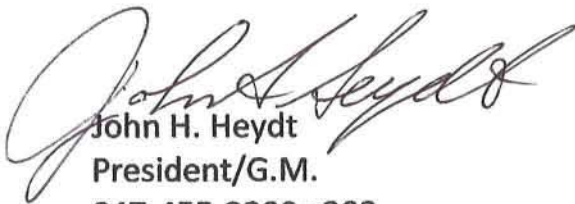
3. I understand that National Pen has been sued for sending "junk faxes" and I have reviewed a copy of the complaint. I understand that the plaintiff's attorneys in this case have claimed that we were sent "junk faxes" without my permission.

4. I am very familiar with the junk fax laws. My fax machine gets blasted with "shotgun" faxes, and I don't like having my ink and paper wasted by voluminous advertising that I don't have any interest in. For example, I often get fax advertisements for things like cruises or roofing repair from companies that I don't do business with. Many of those faxes won't even give you location or contact information so they can trick you into a high pressure sales call, or don't tell you how to stop getting faxes. I

don't have the time or patience to deal with unsolicited faxes like that wasting my time and resources, but National Pen has never done business with me that way.

5. I don't think the junk fax laws apply to the faxes that I receive from National Pen. National Pen has my fax number, my email address and all my contact information because I have provided it to them in the course of doing business and I communicate with them through all of those methods. The reason I receive fax advertisements from National Pen is that I gave my customer rep Karen Smith permission for National Pen to send me information on sales and promotions via fax. I feel very strongly about junk fax laws, but I have no problem getting fax advertisements from vendors like National Pen that I'm doing business with and that have my permission to send faxes.

6. I would have no part in a lawsuit against National Pen because it would be unfair to say the least. I am on their fax list because I agreed to be on their fax list and I am receiving multiple fax advertisements because I gave them my consent to send out fax advertisements. The plaintiff's lawyers here should not include people like me that are doing business with National Pen and gave their consent to receive advertisements in a class action against National Pen.



John H. Heydt
President/G.M.

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**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

CHRISTOPHER LOWE HICKLIN DC PLC,)
d/b/a Clark Road Chiropractic, a Florida)
limited liability company, individually and as)
the representative of a class of similarly-)
situated persons,)

Plaintiff,)

vs.)

NATIONAL PEN CO., LLC, NATIONAL)
PEN HOLDINGS, LLC, and JOHN DOES 1-)
10,)

Defendants.)

Case No. 8:14-cv-02657-VMC-TGW

Hon. Virginia M. Hernandez Covington

AFFIDAVIT OF BARBARA HUFFMAN SMITH

1. My name is Barbara Huffman Smith. I am the President of Huffman Tax Service in Paden City, West Virginia. I am submitting this affidavit to discuss my relationship with National Pen.

2. Our company has been working with National Pen for more than 23 years. I actually bought my first product from them (a calendar) before I started my business, and I continued that relationship when I opened my tax and accounting service. I have been very satisfied with the company. I buy monogrammed pens, calendars, and Christmas music CDs from National Pen and provide them to my clients or even leave them at the post office for people to use. This is basically the only advertisement I have for my business other than word of mouth and a small advertisement in the Tyler Star News and Wetzel Chronicle that I ran for 12 weeks in January, February, and March of 2014. Having my name on these products is very helpful, because potential customers may end up with a pen that has my name on it and call me


for help. Erica Preston is a wonderful customer representative. She has a great personality and is very honest. One time I accidentally paid National Pen twice for an order and they refunded me without me even bringing up the issue.

3. I understand that National Pen has been sued for sending "junk faxes" and I have been provided a copy of the complaint. I understand that the plaintiff's attorneys in this case have claimed that I was sent "junk faxes" without my permission.

4. National Pen has my fax number because I provided it to them in the course of doing business with them many years ago. I do not list my fax number publicly or in any advertisements I run (though it is listed on the pens I buy from National Pen), and National Pen would not have had access to it unless I had given it to them. I have given permission to National Pen to send me fax advertisements. I actually used to have copies of my original orders with National Pen many years ago that would show how I gave them my fax number and permission to send me advertisements, but those documents have been discarded since it happened so many years ago. I have never felt that National Pen sent me an undue number of fax advertisements. If I wanted National Pen to stop sending faxes, I would just call my customer rep Erica since I have her number readily available or send them back a fax. There is always a number on there you can call to stop getting faxes.

5. I get faxes all the time from people like insurance agencies and travel agencies that I would consider "junk faxes." I don't do business with those people and they don't have my permission to send me faxes, so I always call the numbers they include on the bottom of an advertisement and ask them to stop sending me faxes. That is a very different situation from National Pen because I use their products and if I get fax advertisements I want to look them over. National Pen has never sent me a "junk fax."

6. I don't want any part of this lawsuit. I don't understand why they are doing that. It is not true to claim that I was sent junk faxes without my permission. National Pen had and has my permission to send me fax advertisements.


Barbara Huffman

December 9, 2014

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

CHRISTOPHER LOWE HICKLIN DC PLC,)	
d/b/a Clark Road Chiropractic, a Florida)	
limited liability company, individually and as)	
the representative of a class of similarly-)	
situated persons,)	
)	
Plaintiff,)	Case No. 8:14-cv-02657-VMC-TGW
)	
vs.)	Hon. Virginia M. Hernandez Covington
)	
NATIONAL PEN CO., LLC, NATIONAL)	
PEN HOLDINGS, LLC, and JOHN DOES 1-)	
10,)	
)	
Defendants.)	

AFFIDAVIT OF PHIL GRUBB

1. My name is Phil Grubb. I am the Manager and Owner of Fasteners Supply of Goldsboro at 1219 US Highway 117 in Goldsboro, North Carolina. I am submitting this affidavit to discuss my relationship with National Pen.

2. My company has been working with National Pen since our first purchase on February 25, 1998. My customer representative has been Martha Harris for at least 11 years. Martha is fantastic. She doesn't call and bug us; she gets in touch to see if we need anything and keeps us informed about samples and sales through faxes and emails. Everything National Pen faxes us about deals with items we've purchased before or items similar to what we've purchased before, and I have had a great business relationship with them. They have a multitude of items for marketing your own company, things you can put your name on. We've ordered maybe thirty different items over the past decade with them, some examples of which include keychain flashlights, keychain measuring tapes and levels, pens with lights on the end, and even

little pocket knives. We'll often make the pens funny, with phrases like "This pen has been stolen from Fasteners Supply," and people get a good chuckle out of it. National Pen is a great national marketing company, and they allow small businesses like mine to take advantage of volume discounts. I see our pens all over town, from customer's desks to the courthouse, and it really gets our name out there. National Pen has absolutely always had my permission to fax me, and it's certainly not an inconvenience. I would assume that if they're doing their job correctly, they should send me faxes. Nine times out of ten, I've bought from them because they've gotten in touch with me through faxes or email. If I ever wanted to stop receiving faxes, I would just call Martha and let her know to take me off their lists, and I'm sure she would honor the request.

3. I understand that National Pen has been sued for sending "junk faxes" and I have been provided a copy of the complaint. I understand that the plaintiff's attorneys in this case have claimed that I was sent "junk faxes" without my permission.

4. I think of "junk faxes" as faxes from companies I've never done business with, whose items have nothing to do with what I sell. In other cases, junk faxes might be used to push some kind of scam. The most common junk faxes I receive are those advertising cruise vacations or health insurance. I'd say I get those every single week, and they're a big reason why I've got the shredder next to the fax machine.

5. I think the people involved with this lawsuit--whoever they are--are lazy and just looking for a way to make money. The idea that receiving National Pen's faxes is costing me paper and time is just ridiculous. I've never gotten any junk faxes from National Pen. They've helped me advertise and push my business. I consider National Pen and Martha to be assets and partners in marketing, and they've done nothing but beneficial things to help me succeed. I look

forward to their faxes and emails. I consider this lawsuit to be hyped up and made up, and I want no part in it.

 12/18/14

Phil Grubb